No. 2835

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, a Corporation,

Plaintiff in Error,

vs.

ELLA A. HUTCHISON,

Defendant in Error.

Brief of Plaintiff in Error.

On Writ of Error to the District Court of the United States for the District of Oregon.

German Publishing Co.

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Names and Addresses of the Attorneys of Record:

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for the Plaintiff in Error.

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Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The Defendant in Error is the mother of R. Verne Hutchison. The Plaintiff in Error is an Oregon corporation, and at the time of the matters complained of in the complaint was operating a steamer known as the "J. N. TEAL" out of Lewiston, Idaho. The Celilo Canal had just been opened for navigation purposes, and the steamer "J. N. Teal" made the trip from Portland to Lewiston where a celebration was being held in honor of the opening of the canal. The Commercial Club of Lewiston, Idaho, had asked the

Plaintiff in Error to run excursions out of Lewiston in order to aid in the celebration. These excursions were run at various parts of the day. A charge of twenty-five cents was made by the Plaintiff in Error for each passenger. R. Verne Hutchison, the deceased, belonged to the band, and there was some understanding that a band should accompany each excursion. It appears that the arrangement for the band was made by the Lewiston Commercial Club. On the 3rd day of May, 1915, R. Verne Hutchison together with several of the other band boys from Pullman, Washington, boarded the steamer Teal. He paid no fare, but was supposed to furnish music as one of the band boys. However, on this particular trip the band boys did not bring their instruments, so that the deceased paid neither fare nor was any music furnished by the band. On the date last mentioned it appears that R. Verne Hutchison with the other band boys came aboard the steamer, walked to the back end of the steamer and started to go to the hurricane deck. There were two stairways leading to the hurricane deck, one at the front end of the boat, which was safe, and one at the back end of the boat which Plaintiff in Error also contends was safe. The deceased, together with a number of other boys, instead of ascending the stairway to the hurricane deck at the back end of the boat walked out onto the covering of the wheel and the weight of the deceased together with some other six boys broke the covering, the deceased being precipitated through the wheel into the water below where he lost his life.

The Defendant in Error alleged in her complaint several elements of negligence, as follows:

I.

That there was a failure to provide a safe stairway to the hurricane deck.

II.

That the deceased was not warned of the danger of going upon the covering of the water-wheel.

III.

That an invitation was held out to the deceased to go out on this covering of the water-wheel.

IV.

That the covering was not sufficiently strong for the purpose for which it was allowed to be used.

V.

That deceased was permitted to go out upon the covering.

VI.

That no other stairways were provided.

VII.

That the covering of the water-wheel had deteriorated in strength.

The answer of the Plaintiff in Error denies the negligence complained of by the Defendant in Error

and as an affirmative defense sets up contributory negligence of the deceased, R. Verne Hutchison, in going out upon the covering of the wheel voluntarily and without any orders or directions from Plaintiff in Error.

The reply denies the new matter set up in the answer.

The evidence in this case was to the effect that the deceased together with six or seven other boys, walked out on the covering of the wheel voluntarily and without any orders or directions from anyone. The evidence also showed that this covering of the wheel was not built for the purpose of being used to walk upon. There was no testimony in the case to the effect that anyone had been authorized to walk over this covering. The testimony shows that the deceased could have stayed on the stairway and in this way have been safe from any danger.

On page 46 of the Transcript of Record, the testimony of Mr. Tuttle, a witness called by the Defendant in Error, is as follows:

Q. How many of you boys were on the covering of the wheel at the time it broke through?

A. I should say six or eight.

And on page 47 this same witness when asked whether he could have gone straight up the stairway without going onto the covering of the wheel testified as follows:

Q. Well, now, what was to prevent you from stepping off the plank onto the stairway and going to the hurricane deck?

A. I possibly could have done it.

Q. But instead of that you went out on the wheel covering, six or eight of you?

A. I stepped onto the wheel covering.

Q. And six or eight of the other boys did?

A. I think there were six or eight of them altogether of the passengers.

The testimony of the other witnesses was substantially to the same effect.

Plaintiff in error contends that as it had provided a safe way for the deceased to reach the hurricane deck, one from which no danger could result, it had performed its duty, and if the deceased voluntarily, without orders or directions from anyone, walked out onto the covering of the wheel, that in such case it was not negligent. The jury returned a verdict of $5500.00.

Plaintiff in Error relies upon the following assignments of errors:

I.

Error No. 1.

That the Court erred in permitting the witness Dell Wilson to testify that on a previous trip passengers had gone to the hurricane deck, for the reason

that what may have happened on a previous trip would not be any evidence of negligence.

II.

Error No. 2.

The Court permitted testimony to show that a strong degree of affection existed between the Defendant in Error and the deceased. The Plaintiff in Error contends that this action is based upon the pecuniary loss of the Defendant in Error and nothing can be recovered by loss of society, comfort or affection.

III.

Error No. 3.

Error No. 3 is predicated upon the action by the Court in overruling Plaintiff in Error's motion for a directed verdict, Plaintiff in Error contending that there was no negligence shown and that the evidence as submitted proved that the deceased had been guilty of contributory negligence.

IV.

Error No. 4.

Error No. 4 is predicated upon the Court's refusal to instruct the jury to the effect that there was no obligation on the part of the Plaintiff in Error to keep the covering of the wheel in good condition, provided this covering was not intended to be used as a passageway by the deceased, and provided the covering of the wheel was merely used for the pur-

pose of keeping the wheel from throwing water on the deck of the boat, the Plaintiff in Error contending, and the evidence substantiated this contention, that the covering of the wheel being rounded was intrinsically never intended for a walkaway—that a glance at it would convince any mature person that it was not intended for such use, nor is there any evidence in the record that the Plaintiff in Error authorized its use for passengers to walk upon.

V.

Error No. 5.

Error No. 5 is predicated upon the refusal of the Court to instruct the jury that if there are two ways of reaching a given point, one dangerous and the other safe, it is the duty of the person to pursue the safe way, and that if in this case the Plaintiff in Error had furnished a safe way which the deceased could have used, then it was his duty to use it and that if he pursued a dangerous course he cannot recover, the Plaintiff in Error contending that if the deceased had remained on the stairway which was built and intended for his use, and which he could have used, he would then have avoided all danger, but that instead of this he left the safe passageway and walked into a dangerous place.

VI.

Error No. 6.

Error No. 6 is predicated upon the refusal of the Court to inform the jury that it is not to be swayed

by sympathy or prejudice and that the law in cases of this nature aims at compensation for the pecuniary loss which has been suffered.

VII.

Error No. 7.

Error No. 7 is predicated upon the Court's action in instructing the jury that it was the duty of the Plaintiff in Error to properly officer the boat so as to keep the crowd in the place it ought to be and to prevent the crowd from going to places where it ought not to go or in places that would be dangerous, and that threatened places should be properly guarded by barriers and guard rails and ropes so as to prevent intrusion beyond the limits of the passageway, and particularly where the Court informed the jury that it might first consider whether it was dangerous to go upon this covering, and, second, whether it ought to have been protected differently from what it was. There is no claim in the complaint that the boat was not properly officered, nor is there any claim that there should have been barriers or ropes provided.

POINTS AND AUTHORITIES.

ASSIGNMENT OF ERROR NO. 1.

The Court erred in permitting evidence of what happened on a previous trip.

Columbia & Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 202.

Morse v. Minn. & St. Louis Ry. Co., 30 Minn. 465.

Corcoran v. The Village of Peekskill, 108 N. Y. 151.

Terre Haute & Indianapolis R. R. v. Clem, 123 Indiana 15.

Missouri Pacific Ry. v. Hennessey, 75 Texas 155.

ASSIGNMENT OF ERROR NO. 2.

The Court erred in permitting testimony to be introduced in regard to the degree of affection that existed between the deceased and the Defendant in Error.

McFarland v. Oregon Electric Ry. Co., 70 Oregon 27.

13 Cyc. 371.

Wales v. Pacific Electric Motor Co., 130 Calif. 521.

Hillebrand v. Standard Biscuit Co., 139 Calif. 233.

Atchison T. & S. F. R. Co. v. Wilson, 48 Fed. 57.

ASSIGNMENT OF ERROR NO. 3.

That the Court erred in overruling Plaintiff in Error's motion for a directed verdict,

1st: Because there was not sufficient evidence of negligence to be submitted to the jury, and

2nd: The evidence showed that deceased was guilty of contributory negligence.

Radley v. Columbia Railway Co., 44 Oregon 332.

Christenson v. Metropolitan St. Ry. Co., 137 Fed. 708.

Clark's Adm'r. v. Louisville & N. R. Co., 101 Ky. 34.

Benedict v. Minneapolis & St. L. R. Co., 86 Minn. 224.

Burr v. Penn. R. Co., 64 N. J. L. 30.

Conroy v. Chicago, St. P., M. & O. Ry. Co., 96 Wis. 243.

ASSIGNMENT OF ERROR NO. 4.

The Court erred in refusing the following instruction:

"It is in evidence in this case that there was a stairway running from the second to the hurricane deck of this boat, and it appears, that this stairway at the stern of the boat was provided by the defendant company. It was the duty of the defendant company to exercise a high degree of care in maintaining and keeping in order this stairway, providing it permitted this stairway to be used by passengers who may have been on the boat at the time of the accident, but this duty of maintaining this stairway and keeping it in good condition did not extend to the keeping of the covering of the wheel in good condition, providing you find that this wheel covering

was not constructed or intended for use by passengers in walking over it; in other words, the defendant was under no obligation to the deceased R. Verne Hutchison to keep the covering of the wheel in good condition, providing this covering of the wheel was not intended to be used as a passageway by the deceased, and was not intended for that purpose, so that if you find that the covering over this wheel was merely for the purpose of keeping the wheel from throwing water onto the deck of the boat and was not constructed or intended to be used as a passageway or runway for passengers, then I instruct you there was no obligation on the part of the defendant company to keep in repair or condition this covering of the wheel, and your verdict must then be for the defendant company."

St. Louis, I. M. & S. Ry. Co. v. Leftwish, 117 Fed. 127.

Purple v. Union Pac. R. Co., 114 Fed. 123.

Powers v. R. R. Co., 153 Mass. 188.

ASSIGNMENT OF ERROR NO. 5.

The Court erred in refusing the following instruction:

"There is another rule of law to which I will call your attention, which is as follows: Where there are two ways of reaching a given point; one of which is dangerous and the other safe, it is the duty of a person to pursue the safe way; so in this case if you find that the company had provided a ladder or stairway

from the second to the hurricane deck and that this was a safe way by which to reach the hurricane deck, and that the deceased R. Verne Hutchison could have proceeded up the ladder, but instead walked out upon the covering of the wheel, which was out of his way, and which was apparently dangerous, and he could see that this covering, or as a person of ordinary prudence ought to have seen that this covering was not intended to walk upon, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant."

Chicago, St. P. & M. & O. Ry. Co. v. Myers, 80 Fed. 361.

Railroad Co. v. Jones, 95 U. S. 439.

Coleman v. Railroad Co., 114 N. Y. 609.

ASSIGNMENT OF ERROR NO. 6.

The court erred in refusing the following instruction:

"You must first consider whether or not the dedefendant company has been negligent, and whether the defendant company is liable to the plaintiff in damages. If you find that the defendant company is not liable in damages under the instruction as heretofore given, then that will end your deliberations and your verdict must be for the defendant. If, on the other hand, you find that the defendant company is liable in damages under the instructions heretofore given and the evidence as you have heard it, then it is your duty to assess the damages to which plaintiff is entitled. In assessing damages you are not to be

guided by sympathy or prejudice. The mere fact that the defendant is a corporation should not influence you one way or the other in awarding damages. The question of the defendant being a corporation is immaterial so far as your deliberations in this case are concerned, nor are you to award any damages because of sympathy or feeling which you may have for the plaintiff and the relatives of this deceased. The law aims in all cases of this kind, when a person is entitled to damages, at compensation for the pecuniary loss which the plaintiff has suffered by reason of the death. It is in evidence here that the deceased was 24 years of age. He was a single man and his mother is his sole beneficiary and heir. It is in evidence that the mother is 59 years old. In your deliberations if you come to the question of damages you may consider the age of the deceased R. Verne Hutchison; you may consider his habits, his industry, his physical condition, his intelligence and the ties of friendship and affection which existed between the deceased and the plaintiff. You may also consider the age of the mother and her physical condition, the probable length of her life, and the probable pecuniary loss, if any, which she will suffer by reason of the death of the deceased, and award such damages, taking into consideration all of the elements I have mentioned, as will reasonably compensate the plaintiff for the pecuniary or money loss which she has suffered as a result of the death of deceased."

Wales v. Pacific Electric Motor Co., 130 Calif. 521.

ASSIGNMENT OF ERROR NO. 7.

The Court erred in giving the following instruction:

"Now to particularize a little, the defendant was required to properly officer its boat so as to properly handle the crowd and to keep in the place it ought to be on and about the boat and to prevent its going on or about places it ought not to go or in places that would be dangerous; and also it should give proper warning, and it might do that by notice or it might do that by having officers stationed about the boat in order to prevent the crowd from going into dangerous places; and to this end it should give proper warning of danger and peril. It should also see that all gangways and walks and passages which the public were allowed to use should be safe and protected; and if peril threatened at any place that place should be properly guarded by barriers and guard rails and ropes so as to prevent intrusion beyond the limits of the passageway, and in this way the passengers should be protected, especially upon occasions of this kind, where the boat was thronged with people. And so it will be for you to determine as to the place where the accident occurred. You will take into consideration the roof above the wheel and determine its condition; you will take into consideration the walkway passing back to the foot of the ladder and how that was arranged, and you will take into consideration the way in which they got from the walkway onto the ladder, and then you will

determine whether, under the conditions and circumstances, the way was properly protected so that people would not get into danger. Determine, first, whether it was dangerous to go upon this covering and then, second, whether it ought to have been protected differently from what it was, and then you will determine from all that whether or not the defendant was negligent, having in mind the rule that I have given you as to the degree of care it should exercise in the premises."

Indiana R. R. Co. v. Maurer, 66 N. E. (Ind.) 156.

Fullerton v. Cedar Rapids & M. C. Ry. Co., 101 Iowa 156.

Assignments of Errors are sufficient:

Rule 11, Circuit Court of Appeals.

Tyee Consol. Min. Co. v. Lanstedt, 121 Fed. 709-711.

Moore v. Moore, 121 Fed. 737.

Plain or palpable errors will be considered without assignments.

Shea, et al v. Nilima, et al, 133 Fed. 209.

United States v. Bernays, 158 Fed. 794.

A. Santaella & Co. v. Lange Co., 155 Fed. 724.

N. Y. Life Ins. Co. v. Rankin, 162 Fed. 108.

Baltimore & O. R. R. Co. v. McCune, 174 Fed. 992.

City of Memphis v. St. Louis & S. F. R. Co., 183 Fed. 529.

Chicago, R. I. & P. Ry. Co. v. Barrett, 190 Fed. 125.

Central Imp. Co. v. Cambria Steel Co., 121 Fed. 811.

White v. U. S., 202 Fed. 502.

McBride v. Neal, 214 Fed. 969.

Pittsburgh, C. & St. L. Ry. v. Glinn, 219 Fed. 150.

Pennsylvania Co. v. Sheeley, 221 Fed. 906.

Weems v. U. S., 217 U. S. 362.

Columbia Heights Realty Co. v. Rudolph, 217 U. S. 551.

ARGUMENT.

Assignment of Error No. 1 is predicated upon the action of the Court in permitting evidence of what happened on a previous trip. The evidence showed that the "J. N. TEAL" had been running excursions out of Lewiston, Idaho, prior to the one in question. The Court permitted testimony to show what the condition of the boat was on a prior trip, and particularly the condition of the hurricane deck, the number of people that were on the hurricane deck, etc. The question is what was done and what precautions were taken on the trip. What might have been done on a previous trip, or what might have happened on a subsequent trip is immaterial.

In the case of Columbia & Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 207, Mr. Justice Gray lays down the following rule:

> "Upon this question there has been some difference of opinion in the courts of the several states, but it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent because the taking of such precautions against the future is not to be considered as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant."

In this latter case evidence was admitted to show what was done after the accident. Plaintiff in Error contends that what was done on a previous trip would be just as inadmissable as what occurred on a subsequent trip. The mere fact that the boat might have been overcrowded, or that the Plaintiff in Error was negligent on a previous trip, should not be considered as evidence in determining whether the Plaintiff in Error was negligent upon the trip in question.

Assignment of Error No. 2 is predicated upon the admittance of evidence in regard to the degree of affection that existed between the deceased and the Defendant in Error. The rule appears to be established by the great weight of authorities that the loss of society or affection is not an element of damages. 13th Cyc., page 371, lays down the following rule:

> "LOSS OF SOCIETY.—By the great weight of authorities in an action by parents for the wrongful death of their child, by the husband or wife for the death of his or her spouse, or by the next of kin for the wrongful death of the decedent, damages cannot be recovered for the loss of the society of the deceased."

And in the foot notes Cyc. cites several California cases substantiating this rule, and also cites the case of Holt v. Spokane, etc. R. R. Co., 3 Idaho 703 (s. c. 35 Pac. page 39). We call attention to this citation particularly for the reason that in the case of Anderson v. Great Northern Ry. Co., 15 Idaho 513, the Supreme Court of Idaho sustained the following instruction:

> "In determining the amount you may take into consideration the age, health and intelligence of the child, the degree of intimacy existing between the father and the child, and the loss of companionship, if such be shown, together with what expenses may have been incurred as shown by the evidence, by the father for the funeral and medical expenses."

It will be noticed that this latter case was an action to recover damages for the death of a child four years old. In such an action funeral and medical expenses are elements of damages. Loss of earnings during the minority of the child will also be considered as an element of damages, and it may be claimed with some force that the loss of companionship during the minority of the child is an element of damages.

In the case under consideration the deceased was 24 years old. Judge Ailshie, in deciding the Anderson case, cited as authorities several California cases. Cyc., however, cites the California cases as opposed to the contention of the Idaho Court in the Anderson case.

In the case of Wales v. Pacific Electric Motor Co., 130 Cal. 521, Judge Garoutte reviews the California cases and used the following language:

> "In enlightening the jury as to the measure of damages the court said: 'That is to say, you are to ascertain here what amount, if any, this party contributed to the care and support of the plaintiff here, his mother; not the amount which he earned, as counsel properly stated, but the amount which he contributed to her support and care. And in estimating that amount, as previously stated, you may take into consideration his health, physical ability to labor, and his habits. And in addition to that the law has also said that you may award damages in compensation for the loss of his society.' We have been cited to no case where the law says 'damages may be awarded for the loss of society.' As we read and understand the law, it says directly to the contrary. It is essentially and alone pecuniary loss to the parent which he may recover in damages for the death of his child. In **Pepper v. Southern Pac. Co.**, 105 Cal. 401, the following instruction was declared erroneous: 'That the measure of damages is not alone the pecuniary loss and injury sustained by the plaintiff in the loss of his son, as just explained, but in assessing the damages, you may in addition take into con-

sideration the loss, if any, sustained by plaintiff in being deprived of the comfort, society, and protection of the deceased by reason of his death.' In **Lange v. Schoettler,** 115 Cal. 391, it is said: 'It is true in the case of a mother or a wife the jury have been allowed to consider the fact that they were deprived of the comfort, society and protection of a son or husband, but it has always been held that this was in strict accordance with the rule that only the pecuniary value of the life to the relatives could be recovered.' In **Harrison v. Sutter Street Ry. Co.,** 116 Cal. 156, we find this language: 'While the jury have the right in such a case to consider the loss suffered by the widow in being deprived of the comfort, society and protection of her husband, they can regard these things only for the purpose of fixing the pecuniary value of his life. The instruction here was calculated to lead the jury into the error of supposing that they could on this account add something more than pecuniary loss.' It may well be said in this case that the instruction was calculated to lead the jury in fixing the amount of the verdict to add something more than pecuniary loss. (See also, **Green v. Southern Pac. Co.,** 122 Cal. 563; **Morgan v. Southern Pac. Co.,** 95 Cal. 510). When a jury is told that in making up a verdict it may award damages in compensation for the loss of the society of the deceased, it can only mean what the language so plainly imports, and that is, damages may be awarded for the mere loss of society regardless of any pecuniary loss.''

Assignment of Error No. 3 is predicated upon the action of the court overruling the motion for a di-

rected verdict. The testimony shows that the deceased could have ascended the ladder at the back end of the boat without going upon the covering of the wheel house, and if he had remained on the ladder and ascended it no casualty would have happened. Deceased voluntarily and of his own accord left the stairway or ladder and walked some six or eight feet out on the wheel house. It must have been apparent to the deceased that this wheel house was not intended for the purpose of a walkway. It is rounding in shape; its construction can easily be seen; it is of such a nature that to walk upon it would be obviously dangerous. In this instance the deceased, with six or eight of his companions, walked out on the wheel house, and one of the witnesses of Defendant in Error testified in his deposition that the boys jumped up and down on the wheel house.

The Plaintiff in Error contends that as it had provided a safe way for the deceased to reach the hurricane deck, that he had assumed the additional risk when he left the safe place and went into a place voluntarily of which the Defendant in Error now complains as dangerous.

As was said by the Supreme Court of the State of Wisconsin in the case of Conroy v. Chicago, St. P., M. & O. Ry. Co., 96 Wis., page 250:

> "A carrier owes to its passengers, while that relation exists, the duty of providing reasonably safe stations, whether permanent or temporary, where he may await the arrival of trains, as well as the duty to seasonably warn him when rea-

sonably necessary, of any existing or apprehended danger which may interfere with or imperil his personal safety. * * * Whether the company had performed its entire duty towards him under the circumstances or not it was his duty to exercise ordinary care and caution to secure his own safety. The railway company was not an insurer of his personal safety, and it is familiar law that under the circumstances stated the duties of the plaintiff and of the defendant to observe proper care and caution are reciprocal. If the plaintiff failed to exercise ordinary care and caution and by reason of such failure he sustained the injuries complained of, he was guilty of contributory negligence and must be held to assume the consequent risk or danger of injury. Assumption of risk in such cases is a species of contributory negligence. * * * It is not a question of what he thought or believed would be safe and prudent under the circumstances for him to do. If he unnecessarily exposed himself to a danger obvious to a person of ordinary care and prudence, and was injured in consequence, he cannot recover. He was an adult and must be held bound to the exercise of the same care and prudence as a person of ordinary care, intelligence and judgment. The defendant, on the other hand, had a right to assume that the plaintiff would act with reasonable care and caution and occupy the position or situation to which he had been directed, and we are unable to perceive anything in the case to warrant the inference that the defendant had any reason to apprehend that the plaintiff would expose himself to or incur unnecessary danger.'

Assignment No. 4 is predicated on the error of the Court in refusing to instruct in substance that if this wheel covering was not intended to be used by the passengers, and this was obvious to a man of mature age, that in such case the deceased assumed the additional risk of going onto it.

As was said by Judge Sanborn in the case of St. L., I. M. & S. Ry. Co. v. Leftwich, 117 Fed., page 128:

> "The platforms and steps of railway cars propelled by steam are dangerous places for passengers to ride. They are not provided for that purpose, and passenger coaches generally carry on their doors, or in other conspicuous places, notices that the rules of railway companies forbid the passengers to occupy these places for the purpose of riding upon the trains. Moreover, it is a general rule of law that a passenger who, without any reasonable cause or excuse, rides on a platform or on the steps of a railway car, or on an engine, or on a hand-car, or on a freight or baggage car, or in any other place not designated for the carriage of passengers, is guilty of negligence which, if it contributes to an injury that he sustains, will bar his recovery of damages therefor on account of the concurring negligence of the railway company."

Assignment No. 5 is predicated on the error of the Court in refusing to instruct in substance that where there are two ways of reaching a given point, one dangerous and the other safe, and where the carrier has provided a safe way which is obvious and visible to the passenger, that if the passenger pursues the

unsafe way when the safe way is open to him he is guilty of contributory negligence.

As was said by Judge Thayer, in the case of Chicago, St. P., M. & O. Ry. Co. v. Myers, 80 Fed., page 364:

> "If a passenger of mature age leaves the place which he knows has been provided for him, and without any occasion for so doing, or to gratify his curiosity, goes to another, where the dangers are greater, or places himself in a dangerous attitude, which he was not intended to assume, or if he disobeys any reasonable regulation made by the carrier, it should be held that he assumes whatever increased risk of injury is incurred by so doing. This doctrine has been enforced in a variety of cases, and in view of the evidence it was applicable to the case at bar."

Assignment of Error No. 6 is predicated upon the error of the Court in refusing to instruct the jury that it was not to be guided by sympathy or prejudice, and that the pecuniary loss which plaintiff had suffered was the measure of damages. This instruction does permit the jury to consider the friendship and affection which existed between the deceased and the plaintiff, but only as an element in ascertaining the pecuniary loss which the mother has suffered. In the place of this instruction the court informed the jury (page 175 of transcript) as follows:

"Now, this case is based for the amount of damages to be assessed, if you should find for the plaintiff, upon the loss of companionship and society. The plaintiff is the mother of the deceased, and that the

relationship that you have to consider and hence you will take into consideration certain matters in determining that. In determining the amount you may take into consideration the age, health and intelligence of the child, the degree of the intimacy existing between the father and the child—in this case the mother and the child—and the loss of companionship and society, if such shall be shown, etc. * * * "

This instruction makes the basis of compensation loss of companionship and society.

As was said by the Supreme Court of California in the case of Wales v. Pacific Electric Motor Co., 130 Cal. 524:

> "When a jury is told that in making up a verdict it may award damages in compensation for the loss of the society of the deceased it can only mean what the language so plainly imports, and that is, damages may be awarded for the mere loss of society regardless of any actual pecuniary loss."

Assignment of Error No. 7 is predicated on the error of the Court in instructing the jury that it was the duty of the Plaintiff in Error to properly officer its boat so that the crowds might be properly handled and to prevent people from going into places that are dangerous; also to see that all gangways, walks and passages which the public were allowed to use should be safe and protected, and that threatened places should be properly guarded by barriers, guard rails and ropes so as to prevent intrusion beyond the limits of the passageway. The complaint

does not claim any negligence in this respect. There was no evidence to show that the boat was not properly officered, or that the passageways were not properly barricaded. This instruction is based upon facts not pleaded nor proved. It would also make the Plaintiff in Error an insurer of the safety of the passengers. It would require the Plaintiff in Error to have officers aboard to prevent passengers of mature age from going into dangerous places, as was said by the Supreme Court of Iowa, in the case of Fullerton v. Cedar Rapids & M. C. Ry. Co., 101 Iowa 156:

> "The Court charged the jury as follows: 'If you find from the evidence that the defendant's employees did not stop the said car which caused the accident as soon as they could do so after discovering that the cows were on the track * * * then you will find for the plaintiff.' The defendant complains of that portion of the charge on the ground that it submitted an issue not presented by the pleadings, and we are of the opinion that the objection is well founded. The petition does not aver, in substance or effect, that the defendant or its employees who were operating the car were negligent in failing to discover the cows, but charges that, with knowledge of their presence on the track, the employees negligently and wilfully ran the car against them."

In regard to the assignment of errors, the record in this case shows that the Petition for Writ of Error was filed May 18, 1916. The Clerk's file marks show that the Assignment of Errors were filed on June 3rd, 1916. There is no question raised as to

the sufficiency of the Assignment of Errors and a perusal of the Assignments will, we believe, show that they are in due form.

Rule 11 of this Court reads as follows:

> "The Plaintiff in Error or Appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

It will be noted from the Assignment of Errors, page 20 of the transcript of record, that the first error relates to the introduction of evidence. The evidence is set out in full as provided by Rule 11.

Assignment No. 2 is also in regard to the admission of evidence and the evidence is set out in full.

Assignment No. 3, alleges error in the overruling of Plaintiff in Error's motion for a directed verdict. This motion sets up the reason why Plaintiff in Error should be entitled to a directed verdict, particularly stating that the deceased took a position voluntarily and without orders or directions from anyone and that this act constituted contributory negligence.

Assignments numbers 4, 5, 6, and 7 pertain to the refusal and giving of instructions. The instructions are set up in totidem verbis, as provided in this rule.

Rule 11 provides that where there is no assignment of error counsel will not be heard except at the request of the Court, that errors not assigned according to this rule will be disregarded, but the Court at its option may notice a plain error not assigned. The assignments in this case are in due form. The Court will notice plain errors though not assigned at all.

In the case of Tyee Consol. Min. Co. v. Langstedt, 121 Federal, pages 709-711, this court speaking through Judge Gilbert, had under consideration a somewhat like situation, and used the following language:

> "A motion is made to dismiss the writ of error upon the ground that no assignment of errors was filed with the clerk of the court below at the time of filing the petition for the writ. The motion is made upon the condition of the record as it appears, showing the file marks of the clerk of the court at Juneau, Alaska. From these indorsements of the clerk it appears that the peti-

tion for the writ was filed on June 23rd, 1902; that the writ was issued on that day, and was filed on July 10th, 1902; and that on the same day the assignment of errors was filed. The case of Frame v. Portland, etc., Co., 47 C. C. A. 664, 108 Fed. 750, is cited in support of the motion. In that case the Circuit Court of Appeals for the Eighth Circuit held it indispensable, under rule 11 (32 C. C. A. cxlvi) that the assignment of errors be filed before the issuance of the writ, to the end that the judge to whom application is made for the writ may be informed of the alleged errors upon which the petitioner relies, in order to decide whether the prayer of the petition shall be granted, and that the opposing counsel, as well as the appellate court, may be informed of the questions of law which are to be raised for consideration. On referring to the transcript in the present case, it will be seen that the assignment of errors bears date June 23rd, 1902, the date of the presentation of the petition, and that in the petition, reference is made to it as 'the assignment of errors filed herewith.' The fair inference from these facts is that the assignment of errors was in fact presented to the trial court, and was lodged with the clerk thereof, at the time when the petition for a writ was filed and that through some oversight of the clerk or misconception of his duty, the file mark was not placed thereon until July 10th. In the absence of a showing to the contrary, the presumption will be indulged that such was the case, and the motion to dismiss will therefore be denied."

And in the case of Moore v. Moore, 121 Federal 737, this Court speaking through Judge Gilbert, uses the following language:

> "A motion is made to dismiss the appeal upon the ground, first, that no assignment of errors was filed in the court below; and, second, that the paper which appears in the record as an assignment of errors does not comply with the requirements of Rule 11 of this Court. An assignment of errors is found in the record, but there is no indorsement of a file mark thereon by the clerk. It begins with the recital, however, that the appellant 'presents this assignment of errors together with his petition for appeal.' The last paragraph of the petition for appeal recites that the appellant 'doth herewith present and file his assignment of errors together with the bond on appeal.' The petition was filed on January 27th, 1902, and on the same date an order was made that the appeal be allowed as prayed for. From these facts it is sufficiently evident that the assignment of errors and the petition for appeal were presented to the court on the same date, and were lodged with the clerk thereof. In the absence of a showing to the contrary it will be presumed that such was the case. The failure of the clerk to indorse the assignment of errors as filed cannot defeat the appellant's appeal. Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088. The assignment specifies as errors the refusal of the court to make certain findings which were tendered by the appellant, error in making the findings which were made, and error in the conclusions of law. We find in it no such defect as to justify

a motion to dismiss the appeal. The motion will be overruled."

In connection with the last case, we refer to page 20 of the transcript of the record in which the Assignment of Errors states, that the Assignment of Errors is made in connection with its petition for Writ of Error in the above entitled action, and alleges the following errors. Thus the assignment under consideration was within the ruling of this Court in the last mentioned case.

There are numerous decisions in other jurisdictions in which the appellate courts have considered plain errors or palpable errors, though such errors were not assigned at all. We beg to call attention to a few of these decisions.

In the case of Shea et al v. Nilima et al, 133 Federal, page 209, this Court speaking through District Judge Hawley, held that the defense of laches may be considered by an appellate Court, though not made the subject of an Assignment of Error.

In the case of United States v. Bernays, 158 Federal, page 794, in the Eighth Circuit Court of Appeals, Circuit Judge Adams used the following language:

"Objection is made to our consideration of this fundamental question because of an insufficient assignment of error, but as it lies at the threshold of the case its consideration, in our opinion, is necessarily involved in the assignment of errors as filed, and even if it were not it seems that a

plain error has been committed which under our rules we may and ought to notice."

In the case of A. Santaella & Co. v. Otto F. Lange Co., 155 Federal, page 724, the Circuit Court of Appeals for the 8th Circuit uses the following language:

> "Rule 11 of this court (150 Fed. xxvii), respecting the assignment of errors, declares that 'the court, at its option, may notice plain errors not assigned.' This proviso was and is intended in the interest of justice to reserve to the appellate court the right, resting in public duty, to take cognizance of palpable error on the face of the record and proceedings, especially such as clearly demonstrates that the suitor has no cause of action. 'Where parties have produced all their evidence, and the court has received it, and they have rested their case at the trial, they have thereby admitted, and in that way estopped themselves from denying that they can do no more to overcome the evidence the objection that the evidence is insufficient to sustain a verdict in their favor, because the question of the sufficiency of the evidence always arises before the submission to the jury, and it is the province and duty of the court to determine it.' "

In the case of New York Life Ins. Co. v. Rankin, 162 Federal, page 108, the 8th Circuit Court of Appeals, Circuit Judge Van Devanter uses the following language:

> "Objection is made to our consideration of the question arising upon the admission of evidence of these conversations because error is not separately assigned thereon with the particularity

required by Rule 11 of the rules of this court. Ordinarily, the objection would not be without considerable merit; but as one of the assignments was intended to present the question, and as the rule contemplates that, when justice requires it, we may notice a plain error, though not assigned (see United States v. Tennessee, etc. Co., 176 U. S. 242, 256; 20 Sup. Ct. 270, 44 L. Ed. 452; United States v. Bernays, C.C.A., 158 Fed. 792), we conceive it to be our duty, in view of the circumstances in which the evidence was presented, as before recited, to notice the error in its admission."

In the case of Baltimore & O. R. Co. v. McCune, 174 Fed. 992, the Circuit Court of Appeals for the 3rd Circuit, Circuit Judge Gray, uses the following language:

"But, however, this may be, this court is at liberty to take notice of a plain, palpable error appearing in the record, the correction of which is necessary to the administration of justice between the parties even though the same be not the subject of an assignment by the party aggrieved."

In the case of City of Memphis v. St. Louis & S. F. R. Co., 183 Fed. 529, Circuit Court of Appeals, Sixth Circuit, Sanford, District Judge, the syllabus reads as follows:

"Even when the assignments of error in the Circuit Court of Appeals are insufficient, this does not of itself constitute grounds compelling the dismissal of an appeal, as the court may, nevertheless, under the proviso contained in

> Rule 11 (150 Fed. xvii, 79 C. C. A. xvii) notice a plain error not assigned."

In the case of Chicago, R. I. & P. Ry. Co. v. Barrett et al, 190 Federal 125, Judge Sanford, speaking for the Circuit Court of Appeals for the 6th Circuit, uses the following language:

> "After a careful consideration we are of opinion, however, that as the court did not either specifically refuse or grant this request, but made a finding of facts which is insufficient to support the judgment for the value of the cotton, this error is one of a controlling character of which the court should take notice, although without sufficient assignment of error, under the provision of Rule 11 of this court that even where errors are not properly assigned, 'the court, at its option, may notice a plain error not assigned.' 150 Fed. xxvii, 79 C. C. A. xxvii; City of Memphis v. St. Louis &. S. F. R. Co. (6th Circuit) 183 Fed. 529, 106 C. C. A. 75)."

In the case of Central Improvement Co. et al v. Cambria Steel Co. et al, 201 Fed. page 811, a case decided by the Circuit Court of Appeals for the 8th Circuit, the syllabus, reads as follows:

> "An appeal in a suit in equity in a federal court invokes a trial de novo in the appellate court and under Rule 11 of the Circuit Court of Appeals (193 Fed. vii, 112 C. C. A. vii) a plain error not assigned on such an appeal may be and ought to be considered where the failure to consider it would result in great injustice."

In the case of White v. United States, 202 Fed. page 502, the Circuit Court of Appeals of the 5th

Circuit Court, speaking through District Judge Grubb, uses the following language:

> "It is true the plaintiffs in error do not assign error because of this omission of the court, but a plain error may be noticed by us, in the absence of any assignment. In view of the long and unexplained delay on the part of the government in instituting the suit, we feel that a proper exercise of discretion by the jury would have denied the plaintiff interest."

In the case of McBride v. Neal, 214 Fed. page 969, the Circuit Court of Appeals for the 7th Circuit, uses the following language:

> "An assignment of errors is the pleading of the party seeking a reversal; and this court is always disposed to disregard any technical questions regarding the form or sufficiency of such a pleading, if it can be deemed sufficient to apprise the adversary of the grounds of reversal that are intended to be presented to the court; and we are also always disposed to note a substantial error which has entered into the judgment whether it has been properly assigned or not, and even if there is no assignment."

In the case of Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, 219 Federal 150, Circuit Judge Dennison states that in the 6th Circuit the rules provide that the assignments of error shall be filed at the time of settling the bill of exceptions. Yet, notwithstanding this fact, Judge Dennison uses the following language:

"The assignments of error were belated, not having been filed at the time of settling the bill of exceptions, and they might well be disregarded, under Rule 10 (150 Fed. xxvii, 79 C. C. A. xxvii); but this was a new and probably unfamiliar rule at the time the bill of exceptions was settled, and we have thought proper to look into the assignments."

In the case of Pennsylvania Co. v. Sheeley, 221 Fed. page 906, Judge Dennison speaking for the Circuit Court of Appeals for the 6th Circuit, uses the following language:

"However, there is one matter which must be considered, 'plain error' so that it is our duty, under Rule 11 to notice it without sufficient exception or assignment. The case was tried some months before the Supreme Court in Norfolk Co. v. Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914, C. 172, had formulated the rule of damages in cases of contributory negligence and while the rule, as given by the court below to the jury, was in some respects more favorable to the defendant than it should have been, yet, upon the subject of proportioning damages, it can at least be said that the jury could not well have understood the rule to be as the Supreme Court has said it is, and it seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore be another trial, unless this error can be cured by a remittitur."

It will be noticed that in this last case Judge Dennison states that an erroneous instruction as to the amount of damages which may be recovered in a personal injury case is a plain error, which the Court may consider without any assignment. One of the assignments of errors in the case under consideration is as to the element of damages.

In the case of Weems v. United States, 217 U. S. page 362, Mr. Justice McKenna construes Rule 35 of the Supreme Court of the United States. This rule is identical in wording with Rule 11 of the Circuit Court of Appeals as will be noticed from the foot note at the bottom of page 358 of Volume 217. Mr. Justice McKenna in speaking of this rule uses the following language:

> "It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the courts below, but a consideration of them is invoked under Rule 35 which provides that this court, 'at its option may notice a plain error not assigned.'
>
> "It is objected on the other side that Paraiso v. United States, 207 U. S. 368 stands in the way. But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in Paraiso v. United States, but we exercised it in Wiborg v. United States, 163 U. S. 632, 658; Clyatt v. United States, 197 U. S. 207, 221, and Crawford v. United States, 212 U. S. 183. It may be said, however, that Paraiso v. United States is more directly ap-

plicable as it was concerned with the same kind of a crime as that in the case at bar and that it was contended there as here that the amount of fine and imprisonment imposed inflicted a cruel and unusual punishment. It may be that we were not sufficiently impressed with the importance of those contentions or saw in the circumstances of the case no reason to exercise our right of review under Rule 35. As we have already said, the rule is not a rigid one, and we have less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or bill of rights. And such rights are asserted in this case."

And again in the case of Columbia Heights Realty Co. v. Rudolph, 217 U. S. page 551, Mr. Justice Lurton uses the following language:

"Sections 997 and 1012, Rev. Stat., require the transcript from the Circuit Court to be filed with an assignment of errors, and the thirty-fifth rule of this court prescribed the character of such assignments, and 'that no writ of error or appeal shall be allowed until such assignment of errors shall have been filed * * * and that 'errors not assigned according to this rule will be disregarded, but the court, at its option may notice a plain error not assigned.' This rule refers in terms only to writs of error and appeals under Sec. 5 of the Act of March 3rd, 1891, but

it is, in effect extended to every writ of error or appeal to or from any court by Rule 21, which requires that the brief shall set out 'a specification of the errors involved.' This specification of error, must conform to Rule 35 in particularity. Thus the fourth paragraph of Rule 21, provides: 'When there is no assignment of errors, as required by Section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified, according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.'

"The court has, however, not regarded itself as under any absolute obligation to dismiss a writ of error or appeal because of the non-assignment of errors as required by Sections 997 and 1012, Rev. Stat., having by its rules, reserved the option to notice a plain error whether assigned or not. Ackley School District v. Hall, 106 U. S. 428; Farrar v. Churchill, 135 U. S. 609, 614; United States v. Pena, 175 U. S. 500, 502.

"In the present case the brief of counsel for the plaintiffs in error specifies ten alleged errors. The defendants in error have made no objection for failure to assign error under Section 997 and 1012, Rev. Stat., but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. For these reasons we shall exercise the option reserved under both rules 21 and 35 of examining the transcript that we may be advised as to whether there has occurred any 'plain error' which obviously demands correction.

We respectfully submit that the errors aforesaid entitle Plaintiff in Error to a judgment of reversal.

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